STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 22, 2011
V TYE DONNAILE CHANDLER, Defendant-Appellant.	No. 295041 Wayne Circuit Court LC No. 09-011970-02

Before: K. F. KELLY, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Defendant appeals by right his bench trial conviction for armed robbery, MCL 750.529. Defendant was sentenced to 3 to 15 years' imprisonment. We affirm.[1]

I. BASIC FACTS

The victim was near her home in Hamtramck at night, walking her dog and talking on her cell phone, when three men approached her. One of the men pulled a gun on her while the other two stood by silently. The victim later identified the defendant as one of the two men without the gun. A fourth man was standing nearby but did not participate in the robbery. The victim identified the fourth man as defendant's codefendant. The gunman pointed the gun at the victim's chest and told her to give him her money. The victim did not have any money so the gunman took her cell phone instead. After the victim gave the gunman the cell phone, the three men immediately ran down the alley, away from her. The victim proceeded home, told her mother what had happened, and called the police. Hamtramck Police officers later arrested defendant and his codefendant after the victim picked them out of a lineup.

[1] This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with armed robbery and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. During the final pretrial conference, defendant attempted to accept a plea deal. In return for pleading guilty to armed robbery, the prosecution agreed to move for dismissal of the felony-firearm charge. The trial judge asked defendant if he wished to plead guilty to armed robbery and defendant responded affirmatively. However, when the trial judge asked defendant for further explanation, defendant responded that he "was just there." The trial judge refused to accept the plea and set a date for trial. On the date of the trial, defendant waived his right to a jury trial. The trial judge, the same judge that heard plaintiff's attempted guilty plea and admission that he was there, presided over defendant's bench trial and convicted him of armed robbery, but acquitted him of felony-firearm. After his conviction, defendant moved for a new trial on the basis of ineffective assistance of counsel as result of counsel's advice to defendant to waive his right to a jury trial. The trial judge denied defendant's motion for a new trial.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel because defense counsel advised defendant to waive his right to a jury trial, although defendant had previously admitted to the trial judge that he was present at the scene of the incident. We disagree. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "This Court reviews a trial court's factual findings for clear error and reviews de novo questions of constitutional law." *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008).

"To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008). We will not substitute our judgment for the judgment of counsel regarding matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

As noted, the thrust of defendant's argument is that counsel should have prevented him from waiving his right to a jury trial because he made an allegedly incriminating statement to the trial judge at a prior hearing. We disagree with defendant's contention that his statement amounted to a confession or was otherwise inculpatory. Defendant merely admitted he was present when the crime occurred. He did not indicate that he was involved in the crime, or that he otherwise assisted in the crime, in any way. Thus, the knowledge that the trial court possessed cannot be said to have necessarily tainted the trial court's ultimate decision and deprived defendant of a fair trial. In fact, defendant's statement to the trial judge that he was "just there" during the robbery was consistent with defense counsel's emphasis during cross examination of the victim and closing argument that defendant was merely present while the robbery occurred.

Even if the statement could be interpreted as incriminating or conflicting with defense counsel's strategy, a trial judge sitting in a bench trial is "presumed not to be prejudiced and to follow the law." *People v Oliver*, 170 Mich App 38, 49; 427 NW2d 898 (1988). Under these

circumstances, counsel had no reason to prevent defendant from waiving his right to a jury trial because the failure to do so would not have deprived defendant of a fair trial. Moreover, we also note that nothing in the record suggests that defendant's decision to waive his right to a jury trial was uninformed or involuntary, or that counsel's assistance in that regard was deficient. Rather, the record suggests that counsel advised defendant regarding the difference between a jury trial and a bench trial, and that defendant voluntarily chose to waive his right.

We also reject defendant's related claim that counsel provided ineffective assistance because she changed the defense theory from misidentification in the opening statement to mere presence during closing argument. Defendant mischaracterizes the record. Defense counsel argued both misidentification and mere presence throughout the trial. During the closing argument, defense counsel emphasized mere presence as a result of the strength of the victim's identification testimony. "[A] decision concerning what evidence to highlight during closing argument" is a matter of trial strategy, however, and "[w]e will not second-guess counsel on matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Accordingly, we cannot conclude that counsel's performance was deficient. As a result, defendant's claim of ineffective assistance of counsel fails.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens